In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 478

THE OTTAWA TRIBE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings and opinions of the Indian Claims Commission are reported at 8 Ind. Cl. Comm. 831, 874; 9 Ind. Cl. Comm. 98; and 11 Ind. Cl. Comm. 550, 566. The opinion of the Court of Claims is not yet reported, but is reproduced at pp. 45a–54a of Petitioners' Appendix.

JURISDICTION

The judgment of the Court of Claims was entered on June 12, 1964. The petition for a writ of certiorari was filed on September 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1) and Section 20(c) of the Indian Claims Com-

mission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1054, 25 U.S.C. 70s(c).

QUESTION PRESENTED

Whether the Indian Claims Commission and the Court of Claims properly denied interest on a judgment against the United States under the provision of the Indian Claims Commission Act which allows recovery for claims based upon "fair and honorable dealings."

STATUTE INVOLVED

The pertinent provision of the Indian Claims Commission Act, 60 Stat. 1050, 25 U.S.C. 70a, is as follows:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: * * * (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

STATEMENT

By the Treaty of August 30, 1831, 7 Stat. 359, the United States conveyed to the Ottawa Tribe of Indians a 75,000 acre reservation in what is now Franklin County, Kansas. Subsequently, the Ottawas made numerous proposals to the United States for a new treaty that would individualize part of the land and allow the sale of the balance (8 Ind. Cl. Comm. at

832–835, Fdgs. 4–6).[1] These proposals culminated in the treaty of June 24, 1862, 12 Stat. 1237, whereby all tribal members received an allotment of land, and, of the remaining land, 20,640 acres were set aside to endow permanently a school for the benefit of the tribe and 30,000 acres were to be sold with the proceeds held in trust for the tribe (8 Ind. Cl. Comm. 834–838, Fdgs. 6–10).

The present controversy involves 15,000 of the 20,640 acres of school land and the provisions for their sale as set out in Article VI of the Treaty. 12 Stat. 1238–1239 (Pet. App. 3). Of the 20,640 acres, 640 acres were to be retained for the school site, 5,000 acres were to be sold to provide funds for the school building, and 15,000 acres were to be sold, the proceeds kept intact and invested in loans secured by real estate, and the interest applied to the support of the school (8 Ind. Cl. Comm. 835–836, Fdg. 7; see Pet. App. 3). Article VI also established a school board of seven trustees, four Indians and three white men, who were given full authority to sell the school lands and to manage and invest the proceeds as called for in the Treaty.

The Ottawa Tribe brought this suit before the Indian Claims Commission seeking recovery for numerous abuses suffered as a result of this allotment and sale of their lands. The Commission found that

[1] Congress had provided by statute for negotiation with the midwestern tribes in order to open more lands for settlement. Act of March 3, 1853, 10 Stat. 226; the Kansas-Nebraska Act, 10 Stat. 277; the Act of July 22, 1854, 10 Stat. 308.

the 15,000 acres intended to be an endowment for the school were dissipated by the trustees in various ways and that the tribe received only $4,934.25 from the proceeds of their sale (Pet. App. 48a).[2] The Commission ruled that the United States had no legal obligation with respect to the sale of the school lands because, under the Treaty, the school board was an independent body over which the United States had no control (8 Ind. Cl. Comm. 883; Pet. App. 9a). However, the Commission held that the United States had a moral obligation to see that the 1862 Treaty contained safeguards for the protection of the educational trust and that this moral obligation was not fulfilled (8 Ind. Cl. Comm. 884; Pet. App. 10a). Consequently, under the "fair and honorable dealings" provision of 25 U.S.C. 70a, *supra*, p. 2, recovery of $75,577.42 was allowed as the value of the 15,000 acres in the educational trust (Pet. App. 44a, items 3, 9, 6). Petitioners also contended that the Commission should award interest on the principal sum recovered for the 15,000 acres in order to compensate for the failure of the school board to invest the proceeds in the manner called for in the Treaty. However, the Commission refused to allow interest against the United States on the recovery based on violation of a moral obligation (8 Ind. Cl. Comm. 898; 9 Ind. Cl. Comm. 98, 101–102; Pet. App. 24a) and the Court of Claims adopted the ruling of the Commission in this respect (Pet. App. 50a). The present petition challenges that ruling.

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[2] The school was constructed, was maintained and is in operation today (Pet. App. 47a).

ARGUMENT

The decision of the Court of Claims is plainly correct and there is no reason for this Court to review it.

1. This Court and the Court of Claims have long adhered to the traditional rule that interest on claims against the United States cannot be recovered, absent express congressional direction to the contrary. *United States* v. *Tillamooks,* 341 U.S. 48; *Assiniboine Indian Tribe* v. *United States,* 121 F. Supp. 906, 909–912 (C. Cls.), certiorari denied, 348 U.S. 863; *Blackfeet & Gros Ventre Tribes* v. *United States,* 119 F. Supp. 161, 167–168 (C. Cls.), certiorari denied, 348 U.S. 835; *Loyal Band or Group of Creek Indians* v. *United States,* 97 F. Supp. 426, 431 (C. Cls.), certiorari denied, 342 U.S. 813; *Osage Nation of Indians* v. *United States,* 97 F. Supp. 381, 424 (C. Cls.), certiorari denied, 342 U.S. 896. The only exception to this rule is when the taking entitles the claimant to just compensation under the Fifth Amendment. *United States* v. *Tillamooks, supra,* at p. 49. The government's immunity from liability for interest rests upon the principle that the United States' consent to be sued does not include consent to also pay interest. See *United States* v. *Hotel Co.,* 329 U.S. 585, 588. Since nothing in the Indian Claims Commission Act, or any other statute, provides for the payment of interest upon a claim grounded in the fair and honorable dealings clause of 25 U.S.C. 70a, *supra,* p. 2, and since the award was not for a Fifth Amendment taking, interest was properly denied.

2. Petitioners do not deny the established rule just stated (Pet. 6–8), but they argue for a special exception in favor of Indian tribes (Pet. 9–15). There is no basis for such an exception. Certainly nothing in the "fair and honorable dealings" provision justifies an inference that Congress directed payment of interest in such cases. The provision is itself novel to our jurisprudence and the attempt to expand it by implication is contrary to basic principles of statutory interpretation. See *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565.

Petitioners' argument that Indian cession treaties may be exercises of eminent domain in disguise has no application to this case. First, the Commission found that the Ottawas made the overtures to the United States in regard to the 1862 Treaty, not that the United States forced the Treaty on the tribe (8 Ind. Cl. Comm. 832–834, Fdgs. 4, 5); there is no finding that the tribe was coerced into accepting the Treaty. Second, the damages in question arose because of the failure of the school board to execute the terms of the Treaty, not because the Treaty in some manner expropriated the Indian lands, *i.e.*, the fault was in the execution, over which the United States had no control, and not in the planning. Third, if this were some form of Fifth Amendment taking, the Commission would have found a legal liability on the part of the United States. The Commission expressly rejected such a contention (8 Ind. Cl. Comm. 883–884, Pet. App. 9a-10a; 9 Ind. Cl. Comm. 101–102, Pet. App. 28a–29a).

Finally, petitioners cannot collect interest as a substitute for damages that may have been incurred because the trustees failed to invest the trust funds. The prohibition against the payment of interest by the United States, except as expressly provided by Congress or on a Fifth Amendment taking, is all-inclusive. This Court decided that question in *Cherokee Nation* v. *United States,* 270 U.S. 476, 490: "The additional interest now claimed is sought really as damages for the delay of Congress in appropriating the sum due in 1895 as the United States promised in the 1891 agreement. But the rule as to interest against the United States does not allow us to adjudge interest damages at all. Congress must expressly provide for it or the contract must so provide." Petitioners' case is not different because the promise was to invest funds for them rather than a direct promise to pay them. Also, such an award in this case would be totally speculative. There has been no showing as to the rate of return that could be expected from investments of the type contemplated here and petitioners ask this Court to correct that failure of proof by selecting some arbitrary interest rate and applying it against the United States. Without passing on the merits of petitioners' argument if they were requesting damages measured by an interest rate that has some rational basis in the facts of the case, it is clear that they cannot collect interest here.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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